Supreme Court, U.S.
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NO. _____

In the Supreme Court of The United States of America

OCTOBER TERM 1993

Arthur L. Miccio
Petitioner

VS.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C.

New Jersey Department of Community Affairs (DCA)
William Connolly
Charles Decker
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the District Court decide correctly & did the Third Circuit Court of Appeals affirm said decision correctly that the Respondents were entitled to Summary Judgement, even though discovery was not completed & genuine issues of material fact were still in dispute?

2. Did the District Court decide correctly & did the Third Circuit Court of Appeals affirm said decision correctly that the "Plaintiff failed to meet certain performance standards in his backlog," when the Petitioner never received an unsatisfactory work performance rating up to the date of when a reorganization occurred & the "backlog" was never used as a criteria to evaluate the Petitioner's work performance, since Respondents Knew a "construction boom" occurred within the Construction Industry & the Petitioner's Construction Plans Approval Section was understaffed?

3. Did the District Court decide correctly & did the Third Circuit Court of Appeals affirm said decision correctly that the Petitioner failed to objectively establish that the nondiscriminatory reasons by the Respondents were pretextual, even though other Circuit Courts have stated that plaintiff need only make a *minimal* showing of discrimination, in a non-reduction discrimination case, under the ADEA?

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

ARTHUR L. MICCIO, SR., PRO SE, PETITIONER

VS.

NEW JERSEY DEPARTMENT OF
COMMUNITY AFFAIRS (DCA)

WILLIAM CONNOLLY, CHARLES DECKER,
RESPONDENTS

PETITION OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Arthur L. Miccio, Sr., respectfully prays that a writ of certiorari issue to review the judgment order and sur petition for rehearing for the Third Circuit which affirmed the Memorandum and Order issued by the District Court of New Jersey, granting summary judgment to the Respondents, even though discovery was not completed and despite the existence of disputed issues of material fact regarding whether Petitioner had

established a prima facie case of age discrimination and whether respondent's non-discriminatory reasons are pretextual.

OPINIONS BELOW

The unpublished Memoranda and Order by the District Court for the State of New Jersey, appears as Appendix A and the Judgment Order, affirming the District Court's decision appears as Appendix B and the SUR Petition for Rehearing appears as Appendix C.

JURISDICTION

The Petitioner timely filed a discrimination complaint with the United States Federal Court on July 2, 1991 to the United States District Court for the Eastern District of Pennsylvania and was transferred to the New Jersey District Court in Trenton on November 6, 1991.

The Petitioner timely filed an appeal on July 6, 1993 to the Third District Court and issued a Judgment Order, dated November 12, 1993 which affirmed the District Court's decision and the Petitioner's Petition for Rehearing was denied dated January 4, 1994 and a timely Writ of Certiorari to the Honorable Supreme Court is now filed by the Petitioner. This Court's jurisdiction is invoked under Title 23, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C., §621 et seq.

Fourteenth Amendment to the Constitution.

STATEMENT OF THE CASE

The Petitioner, timely filed a discrimination complaint, without any citings, Pro Se, on July 2, 1991, to the United States District Court for the Eastern District of Pennsylvania which was subsequently transferred to the District Court of New Jersey (Trenton) on November 6, 1991.

On April 4, 1992, the Petitioner was allowed (20) days to amend his original claim and add an age discrimination claim pursuant to 29 U.S.C. §621 et seq., but the District Court Magistrate denied Petitioner's motion under Rule 12, to again amend his complaint to include a Conspiracy Claim pursuant to (§1983), because of a minor defect, and the District Court Judge denied the Appeal made in the interest of justice under Fed. R. Civ. P. 15, to be allowed to make a second amendment to the claim.

On April 24, 1993, the Respondents Motion to Dismiss Petitioner's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), was denied, but Respondents Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 was granted. The lower District Court, established the elements of criteria, which were used and affirmed by the Third Circuit Court.

(1) plaintiff is a member of the protected class

(2) plaintiff is qualified for the position he sought but did not receive

(3) the promotion sought was given to a person sufficiently younger to permit an inference of age discrimination

The lower District Court stated the Petitioner satisfied both the first and third elements of criteria, but failed the second element of criteria, stating the Petitioner was not qualified based upon the "objective" qualifications, used by the Respondents. However after summary judgment was issued the Respondents admitted

the Petitioner was treated differently from the other younger employees and his upgraded, across-the-board, promotional title, *in dispute,* was changed and placed in the SES/unclassified service rather than remaining in the classified service classification.

The Petitioner timely filed an appeal, Pro Se, to the Third Circuit Court of Appeals. The Petitioner argued before the Third Circuit Court that the Summary Judgment was issued prior to discovery being completed, pursuant to the Fed. R. Civ. P. 56.

The Respondents implemented a non-reduction in work force reorganization, which expanded a single bureau to six (6) new bureaus, which upgraded the Petitioner's working section as a whole entity, to a bureau level and provided across-the-board title upgrades and higher salaries for all employees, *except* for the *Petitioner.*

Also the lower District Court erred when it held the Petitioner had not established a prima facie case and the lower court erred when it found Petitioner failed to establish that Respondent's reasons were pretextual. However, in a Judgment Order dated November 12, 1993, The Third Circuit Court of Appeals and a Sur Petition for Rehearing was denied on January 4, 1994.

REASONS FOR GRANTING WRIT

Certiorari should be granted since the Petition presents issues resolved by the implication of this Honorable Court, as well as any specifically intended by this Court; and that the Opinion below conflicts by implications of this Court and the decision of other Circuit Court of Appeals.

1. Generally a summary judgment may only be granted if there is no genuine issue, as to any material fact and the non-moving party receives the benefit of all reasonable doubts and inference drawn from the underlying facts, which still remain in the Petitioner's

case *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) Coastal States Gas Corp., 84 FRD (Del. D.C. 1979).*

However, in this case, summary judgment was granted, pursuant to the Fed. R. Civ. P. 56 prior to the completion of discovery and even though key issues of material fact were still in dispute.

Therefore, the summary judgment was granted, prior to the admission by the Respondents (p. 31 within their Reply Brief to the Third Circuit Court), that it was only the Petitioner's upgrade "classified" promotional title, which was treated differently from all the other younger employees, when an across-the-board title upgrades and salary increases were issued to all other employees, (the Petitioner, was *excluded).*

This statement, (together with the documents which were never disclosed), was *never* previously stated within the Respondent's papers to the lower District Court and were only stated, *after* the summary judgment was issued, but the Respondents now admit the Petitioner's classified upgrade was changed and placed in the SES/unclassified classification, in violation of the ADEA.

There is little doubt if the Petitioner was allowed to complete his discovery/depositions that additional discriminatory actions would have been discovered, to prepare his case for trial.

2. Another major proffered reason being used against the Petitioner, is the Respondent's statement, "Plaintiff failed to meet certain performance standards in his backlog."

However, after (21) years of contiguous employment, all within the same working section, the Petitioner, other than outstanding work performance ratings, *never* received an unsatisfactory work performance rating and the "backlog" was *never* used

as a criteria to evaluate the Petitioner's work performance, particularly since the Respondents knew the unit was not properly staffed for the workload.

The backlog, therefore only being a conclusionary reason, does reflect that the backlog was allowed to increase because the named Respondents, ignored the Petitioner's recommendations, since 1982, that an increase in staff was necessary to control the workload being placed upon his unit and disclosed in his affidavit.

The few discovery documents, provided by the Respondent's attorney, does reveal that between 1983 to 1986, new applications increased from (223) to (860) per year and the 386% increase was accompanied by only a 27% increase in staff.

It was for this very reason, Defendant Connolly's affidavit confirms an "explosion" occurred in the construction work being done in the State of New Jersey and therefore stated in his affidavit on *page 3;* "The reorganization was undertaken solely as a means of decreasing what had become an excessive workload for any *person, section* or *bureau.*"

Therefore, it is obvious, only when Defendant Connolly became cognizant, that it was a *HUMAN IMPOSSIBILITY* to expedite the construction plans, did he implement the very same recommendations, previously submitted by the Petitioner, to increase the staff, plus increase the salaries, in order to compete with the marketplace, and was disclosed in the documents attached to the Petitioner's affidavit.

Therefore, the backlog is solely being used by the Respondents because they planned to use the reorganization, of the former Bureau of Construction Code Enforcement, as a device to conceal their true motives and intentions, to single out and displace the Petitioner, in a manner to "make room" and provide

preferential treatment, for a younger, less experienced, *unclassified* employee, only because he retained an architect's license.

It is also evident the lower District Court erred by overlooking, *item 24* (Appendix F), of the Petitioner's affidavit, by concluding and stating; "It is uncontradicted that while plaintiff was serving as the Supervisor of the Construction Plans Approval Section plaintiff failed to meet certain performance standards in that his backlog of construction plans submitted for state approval increased to 700".

However, the Petitioner's affidavit, with attached documents all submitted to the lower District Court, clearly disputes this fact and any reasonable jury would find in favor of Petitioner, by testimony from witnesses.

3. *Here, material issues of fact exist.* The lower District Court relied upon the "standard and rigid" elements of criteria from the McDonnell Douglas and Texas Department of Community Affairs cases, to establish the elements of criteria, which were used and affirmed by the Third Circuit Court, as follows:

   (1) plaintiff is a member of the protected class

   (2) plaintiff is qualified for the position he sought but did not receive

   (3) the promotion sought was given to a person sufficiently younger to permit an inference of age discrimination.

   The lower District Court stated the Petitioner satisfied both the first and third elements of criteria, but failed the second element of criteria, stating the Petitioner was not qualified based upon the "objective" qualifications, used by the Respondents. However after summary judgment was issued the Respondents admitted the Petitioner was treated differently from the other younger employees and his

upgraded, across-the-board, promotional title, *in dispute,* was changed and placed in the SES/unclassified service rather than remaining in the classified service classification.

The dispute, is based upon the very fact now admitted to the Third Circuit Court, that if the Respondents did not treat the Petitioner *differently* from the other younger employees, but rather retained the Petitioner's upgrade in the permanent, classified Civil Service classification (as other employees), rather than changing and placing the upgrade into the SES/unclassified service classification, there *never* was *any reason* to formulate new, objective qualifications in a different employee classification used against the Petitioner, in violation of the ADEA, 29 U.S.C. §621 et seq.

The Third Circuit Court also used the standard criteria and affirmed the summary judgment.

The Third Circuit Court did not express or reach out as to the exact *minimal* requirements for the Petitioner's particular case, but were expressed by the Fifth Circuit Court of Appeals, as discovered by the Petitioner, Pro Se, and more closely compares with the issues of fact which exist in this case.

The Fifth Circuit in the *Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633 (1985)* although a reduction case, did express the minimum criteria for the Petitioner's age discrimination case, which is a non-reduction in work force case and the Petitioner need only show the *very* minimal showing that different treatment between younger and older employees occurred in the workplace to meet the doctrine established by the ADEA.

The Petitioner, a permanent classified Civil Service employee, with more than satisfactory performance review ratings, supervised the same working section for over (8) years and has worked in

the section for (21) years was displaced by an unclassified Project Specialist younger employee, employed about one (1) year.

The favored unclassified employee did not have the classified title, even equal to the Petitioner or the extensive work experience of (21) years in performing the job functions in reviewing Construction Code matters.

This is the very reason why the Petitioner, was *"already qualified"* in the permanent *classified* employee *classification* and received *higher rankings* than other engineering college graduate and/or an architect's or engineering license, by an appropriate Civil Service open competitive testing and selection process and therefore was certified and classified to *supervise* his *working section.*

The Petitioner held the titles of Project Engineer and Supervisor of Construction and Inspections which both required an engineering degree and/or an architect's or engineering license and not only performed the job functions in an outstanding manner but received promotions from such titles.

In addition, the Respondents were willing to place the Petitioner in an unclassified, upgrade promotion, also requiring the same identical qualifications as those of the new, objective qualifications, now being used as a tool to deny the Petitioner equal treatment in the workplace, in violation to the ADEA.

Therefore, it is apparent, the Petitioner maintains a valid issue of dispute, as to whether he *must requalify* to the new, objective qualifications or the second element of criteria, established by the lower District Court, solely to receive equal and compatible treatment or Equal Employment (promotional) Opportunities, in the workplace, as provided for all other employees, because the Respondents now admit the

Petitioner's upgrade (across-the-board) promotion was treated differently than the younger employees, changed in classification and placed in the SES/unclassified classification, in violation of the ADEA.

The Petitioner has shown the minimal requirements, expressed by the Fifth Circuit Court, in that; (1) he is in the protected class; (2) was already qualified to supervise his working section (in the classified classification) for the upgrade promotional position and; (3) that younger employees were more favorably treated and he was displaced by a younger, less experienced, unclassified employee, who was not equal to the Petitioner's classified permanent Civil Service classification.

In addition to the above, the "standard and rigid" elements of criteria, do not fit the "specific" criteria to the Petitioner's employment age discrimination case, since an "upgrade promotion" does not require the Petitioner to apply for the position nor the Respondents to post a job vacancy, as implied by the criteria used by the lower District Court, because the position being upgraded is already occupied.

In this context, the Fifth Circuit Court further indicated in an employment discrimination suit, the question is *not* whether Petitioner proves pretext, but rather Petitioner raises genuine issue of fact regarding pretext and material issues preclude summary judgment.

Since the Third Circuit Court remained silent and did not express the extent of evidence, either direct or circumstantial the Fifth Circuit Court also cited:

McDonnell Douglas v. Green, U.S. 792 (1973).

Texas Depart. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).

Furnco Construction v. Waters, 438 U.S. 577 (1978).

the Honorable Supreme Court should remedy or clarify the conflicts which exist between the Third and Fifth Circuits, or any other Circuits, regarding the extent of direct or circumstantial evidence to be shown by the Petitioner for a *minimum showing*, that discriminatory actions of his employer occurred in a non-reduction case.

The Petitioner's, non-reduction in work force employment age discrimination which provided across-the-board upgrade promotions and salary increases for all other younger employees, except for the Petitioner, and therefore remains in direct violation of the ADEA.

The summary judgment against the Petitioner, which indicates the aging Petitioner was not treated differently from all the younger employees, remains incorrect and in the Petitioner's non-reduction case, in direct violation of the ADEA.

EVIDENCE OF PRETEXT

a) The proffered reason that because the Petitioner did not have an engineering degree and/or an architect's or engineering license and therefore did not meet the new, objective qualifications, formulated by the Respondents, just prior to an across-the-board upgrades were issued to all other younger, less qualified employees, except for the Petitioner, has now been admitted by the Respondents to the Third Circuit Court.

The admission clarifies why the summary judgment was submitted by the Respondents, prior to full disclosure of the discovery documents and also explains how the Petitioner's upgrade was treated differently from all the younger, less experienced employees.

Although, the upgrade of the Petitioner's work-

ing section, as a whole entity to a bureau level, was only intended to upgrade and "retitle" the out-dated previous titles and also issue salary increases for *all* of the employees, it was used as a tool to single-out, differentiate, exclude, demote and displace the Petitioner, arbitrarily, by a new, younger, less experienced unclassified employee.

Therefore, it now is conclusive, if the Petitioner's upgrade, promotional title, had remained in the classified Civil Service classification rather than being changed and placed in the SES/unclassified service classification he would have received the upgraded promotion, since the Petitioner was already qualified in the classified service. The only reason for the new, objective qualifications, specifically designed and tailored to fit only the younger, unclassified employee, was to provide preferential treatment for the younger employee and to purposely single-out, differentiate and displace the aging Petitioner and to make room for the younger unclassified employee.

b) The backlog of projects, in itself, is only a conclusionary statement and has no relevance to the Petitioner's work performance.

After (21) years of outstanding work performance and continuously receiving promotions in the classified service classification, the Petitioner never received an unsatisfactory work performance rating and the backlog was never used to evaluate the work performance of the Petitioner. The fact is as the work increased so did the Petitioner's work performance increase as well as the working section work performance increased.

Therefore, it is obvious if the lower District Court had not overlooked, item 24, (Appendix F) of the Petitioner's affidavit having attached documents and evidence, the lower Court would not have erred, by

concluding the backlog was "uncontradicted" by the Petitioner.

The fact of the matter, the Court would have discovered that the work output by the understaffed section was the highest in the history of the Division.

The section, now requires a staff of (30) employees to control a consistent monthly backlog of slightly over (300) projects, yet, under the supervision of the Petitioner, only a staff of (12) was provided.

In addition, the lower District Court would have discovered the documents in Exhibit (C), attached to the Petitioner's affidavit, recommended an increase in staffing due to the increase in workload as early as 1982, by the Petitioner and salary increases be accordingly issued to keep competitive with the marketplace. These recommendations were consistently made several times a year throughout a number of years, but were continually ignored by the named Respondents.

The Respondents, also increased the regular (35) hour work week to (40) hours and resulted in the Petitioner now receiving a lower hourly pay rate of $1.89 per hour, yet all younger less experienced employees received $3.00-$6.00 per hour pay rate increases.

Yet, the lower Courts have not found this as a reason of differential treatment between younger and older employees, even though it is in direct violation of the ADEA, the intentions of Congress or the Honorable Supreme Court.

The same (upgrade) title of Bureau Chief was always in the classified Civil Service classification prior to the non-reduction reorganization, before the working section was upgraded to a bureau level.

The articulated reasons regarding the Petitioner's work performance are conclusionary, not

based on fact, and are therefore pretextual reasons for Petitioner's demotion and replacement.

c) The basis of selection of Lange, because he was a licensed architect is also a pretext.

In order to supervise the unit effectively, an individual must have an extraordinary amount of construction codes, enforcement, inspections, and professional skills to train and guide the employees to be efficient and effective personnel.

Therefore, because an individual may retain an architect's or engineering license, does not in itself indicate that such an individual can automatically become the supervisor of the section since such a license, alone, is not even used to supervise the section, as indicated by the Petitioner's affidavit.

The state itself recognizes this and unless *any* individual obtains the necessary Construction Official licenses to appropriately enforce the construction codes and engineering standards, they *can not* implement enforcement.

Since Respondent Connolly's affidavit indicates the tentative reorganization began in 1986 and Lange became employed with DCA in November of 1985. The younger employee, Lange, was unable to be placed in the Construction Plans Approval Section, under the supervision of the Petitioner, because he *failed* to *retain* the *appropriate Construction Official* licenses. Certainly the selection of Lange, because he was a licensed architect, was used for pretextual purposes only.

Also, it should be noted, because the named Defendants, also much younger than the Petitioner, are both licensed architects, preferential treatment was given to the younger unclassified employee, only because he too is a licensed architect.

Certainly any reasonable jury would find this

reason, as conclusionary and in favor of the Petitioner, from witnesses at trial.

d) The other two (2) proffered reasons stated by the Respondents, also in conclusionary language, are combined and stated, that; "Lange was Plaintiff's supervisor prior to the reorganization and, as such, had much broader and higher level duties and responsibilities than Plaintiff; and Lange possessed stronger management skills, oral and written communication skills and was more effective in supervising professional personnel than Plaintiff."

The Respondents, (after summary judgment), now admit to the Third Circuit Court papers, that Lange was given, (a "midnight unclassified"), working title of Assistant Bureau Chief, just prior to the reorganization.

The vacancy, for the "classified" Assistant Bureau Chief was never posted by the Respondents, because Lange, even though a licensed architect neither had the proper credentials of the Construction Official licenses nor was eligible to be promoted in the permanent classified employee classification and was the very reason he was hired by DCA, as an unclassified Project Specialist in Aging.

Therefore, Lange, by *law* was never the supervisor of the Petitioner, who was mandated to continue to report directly to the Bureau Chief, prior to the reorganization.

The working title was solely used because the Respondents had already planned to provide special preferential treatment for Lange, only because he is a licensed architect and the younger, less experienced unclassified employee would be used to displace the aging Petitioner, under pretextual reasons, in direct violation of the ADEA.

Also, if the lower District Court properly re-

viewed the Petitioner's affidavit the Court would have discovered that Lange was hired in November of 1985 and Defendant Connolly's affidavit the (tentative) reorganization occurred in the later part of 1986 or less than one year of employment by Lange, who never had any training, experience, licenses or the capability to be the supervisor of the section and Defendant Connolly was well aware of the superior abilities of the Petitioner, since he states he was employed for (21) years with DCA.

The Petitioner's affidavit with attached documents discloses that under the supervision of the younger employee, Lange, the staff increased over 200%, the supervision of the professional personnel has been deficient.

Also the Respondents were well aware of the outstanding oral and written communication abilities of the Petitioner, who was guest speaker for the New Jersey Society of Professional Engineers, petitioner provided DCA sponsored, all day seminars to architects and engineers in the construction codes, served for (3) years on the Professional Engineer's construction committee, taught for Trenton State College for (3) years, wrote articles, published in professional journals and was recognized throughout the State of New Jersey (plus other states) for his knowledge and capabilities regarding construction codes and their engineering standards, Petitioner has over (30) years of direct supervisory experienced, including Chief Engineer in the private industry, supervising professional personnel.

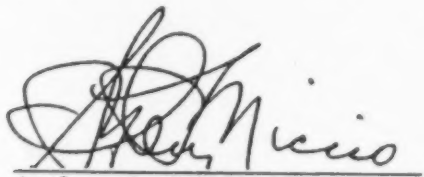
Therefore, any reasonable jury would find in favor of the Petitioner, that the statements by the Respondents were being used for pretextual reasons only.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue the judgment and opinion of the Third Circuit Court of Appeals in this matter.[2]

DATED: April 4, 1994

Respectfully submitted,



Arthur L. Miccio, Pro Se

[2]The Petitioner being Pro Se, would even prefer if the Honorable Supreme Court agrees with the issues presented in this writ, that the writ issues be remanded to the Third Circuit Court of Appeals for determination in light of this Court's opinions.